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JURISDICTIONAL STATEMENT

Respondents agree that this Court has general jurisdiction over this appeal by its order of transfer pursuant to Article 5, Section I of the Missouri Constitution and Mo. R. Civ. P. 83.04. The circuit court's ruling on the Respondents' post-trial motions resulted in a final order and judgment upon all claims as to all parties and from which an appeal was taken pursuant to Mo. R. Civ. P. 74.01, and which resulted in an order affirming the ruling of the circuit court.

STATEMENT OF FACTS[1]

Pursuant to Rule 84.04(f), Respondents Gordon A. Gundaker Real Estate Co., Inc. ("Gundaker Realtors"), Beth Gundaker-Lisk ("Lisk") and Larry Wilson, Jr. ("Wilson") (collectively "Gundaker") are not satisfied with the Statement of Facts set forth by the Appellants in that they do not constitute a fair, concise statement thereof, and hereby correct the errors therein as follows:

I. Construction of the House at 118 Glen Road.

Gundaker agrees with the majority of the Appellants' statements under this heading. However, Mr. Kiernan's letters (the neighbor who wrote letters regarding alleged defects in the construction of the house) contain numerous questions and preferences, rather than a simple recitation of "errors and omissions in the construction process," as Appellants intimate on page 7 of Appellants' Brief. EXH. at 12-15. Also, the exhibit referenced in Appellants' Brief does not indicate that Mr. Kiernan "specifically observed that the exterior of the foundation had not been damp proofed," only that he "did not see any waterproofing" and recommended that someone "establish the absence or presence of such coatings and, if present, how high up the walls they have been applied." EXH 13.

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[1] All references to the Trial Transcript will designate the volume number (Tr. I-II at 320) or the date on which it was taken for that portion of the transcript that is not assigned a volume number (Tr. 9/27/00 at 1). All references to the legal file shall be designated LF. All references to the exhibit portion of the legal file shall be designated EXH.

Appellants also omitted several key facts in the description of the construction of the house. Mike Harney is the building commissioner for the City of Webster Groves, responsible for administering and executing the building and zoning regulations. Tr. 9/27/00 at 7-8. Based upon his approximately 15 code compliance inspections during construction at 118 Glen Road, Mr. Harney issued a code compliance certificate and occupancy permit for 118 Glen Road. Tr. 9/27/00 at 10-11. This code compliance certificate (EXH 59) was intended to state to all persons who might inquire that the property "was in compliance with the code." Tr. 9/27/00 at 26. Mr. Harney assumed that the builder damp-proofed the foundation (Tr. 9/27/00 at 30) despite having been alerted to the fact that the dirt had been back-filled against the foundation without any damp-proofing having been applied prior to issuing the final code compliance certificate and occupancy permit. Tr. 9/27/00 at 243-244.

A neighbor, Mr. Bill Buchanan, specifically told Mr. Harney, the building commissioner, about his concerns or surprise that the foundation had not been damp-proofed and relied on Harney to do some sort of code enforcement. Tr. 9/27/00 at 245,247. Mr. Harney issued the code compliance certificate after this notification, despite his ability to enforce the code and "require the builder to bring it up to compliance." Tr. 9/27/00 at 27-28. As Mr. Harney stated: "I believe that the city can go back and ask that these items be taken care of." *Id,* at 28.

II. Mr. Kiernan's Letters.

Gundaker agrees that Mr. Kiernan sent letters to the Vescovo Respondents and Janet McAfee Realtors, the Vescovo's real estate broker prior to Gundaker's agreement to market the property. However, as stated above, the letter only questions the status of damp-proofing. It is not a definitive statement that there is no damp-proofing on the foundation. EXH at 13. Moreover, the reason there is "no question that this letter was received" by Janet McAfee Realtors is because it was sent via certified mail, return receipt requested. Mr. Kiernan received a card in the mail confirming receipt. Tr. I-II at 434-436. This process was only used on 5/21/98, after he had not heard from Janet McAfee Realtors for almost a month. *Id.* Mr. Kiernan "wanted to make sure that they were reading the letter." *Id.* at 434.

Gundaker further agrees that Ted Thornhill, of Janet McAfee Realtors, discussed the letter with Robert Vescovo and Mr. Vescovo expressly denied any validity to the letter. Appellants' Brief at 12. However, the cited portion of the record does not support Appellants' statement that Janet McAfee Realtors "insisted on disclosing the letter to prospective purchasers." *Id.* In fact, Janet McAfee Realtors had only two purchasers subsequent to receiving the letter, one of whom was told nothing about the letter, (Tr. I-II at 518), while the other was told only that there was a letter criticizing the property, but none of the contents of the letter, even after several rounds of contract negotiation. Tr. I-II at 518-520. Ms. Vicki Kirk, agent for Janet McAfee Realtors, explained that there were many disgruntled people who criticized new construction in Webster Groves that replaced existing housing. Tr. I-II at 521. However, despite knowing that Gundaker Realtors would be taking over the listing of the property, no one from Janet McAfee Realtors ever told anyone at Gundaker Realtors about the existence of the letter. Tr. I-II at 504-505, 522-523.

III. Gundaker's Marketing the Property.

Gundaker agrees that Gundaker Realtors and Wilson entered into a marketing agreement for 118 Glen Road. EXH at 85-87. However, Lisk's name does not appear on the agreement. Id. The agreement provided that Gundaker Realtors would advertize the property in the Multi-List Service, provide open houses and make an account manager (Wilson) available. *Id*. at 85. The agreement did not, however, provide for a commission to be paid to Gundaker Realtors, only a marketing fee, unless it procured the buyer. *Id* at 87. Appellants were represented by their own agent, Stacy Fryrear, (EXH at 4, Tr. I-II at 272) and, as such, Gundaker Realtors was entitled to no commission, only a marketing fee. EXH at 87.

Regarding any discussion between the Vescovo Respondents and Gundaker, Robert Vescovo testified that he told Wilson only that he had received a letter from someone he did not know and the letter had no foundation. Tr. 9/27/00 at 4-5. However, contrary to Appellants' assertion, nowhere did Robert Vescovo discuss the contents with Wilson: Robert Vescovo "just said I had a letter from a crackpot . . . a nut case." Tr. III-V at 460. At no time did Robert Vescovo discuss Mr. Kiernan's specific criticisms or even Mr. Kiernan's general comments about the house. Tr. III-V at 460-462. In fact, the whole conversation took less than five minutes, including discussions about baseball, when Robert Vescovo had a chance meeting with Wilson at a restaurant months before Gundaker Realtors took over the marketing of the home. Tr. III-V 459-462. No one ever had any discussions with Lisk about the condition of the house. Tr. III-V at 462, 518-519.

IV. Kiernan's Letter to Gundaker.

Gundaker agrees that the testimony indicated that the sign in the front yard at 118 Glen Road included the name of Beth Lisk, and not Larry Wilson. Appellants' Brief at 10. However, the phone number on the sign was a direct line to Wilson. Tr. III-V at 513, 571. Thus, Appellants are wrong in stating that Mr. Kiernan "contacted the Gundaker office listed on the sign" or that the number "rang at the New Homes Division of Gundaker . . . Mr. Kiernan's call was routed to Mr. Wilson." The call from Mr. Kiernan went directly to Wilson on his cellular phone. Tr. III-V at 571.

It is further inaccurate to state that Wilson confirmed Lisk's "correct mailing address" or to draw an inference that 2458 Old Dorsett (Gundaker Realtors' Corporate Office Center) is Lisk's address. Appellants' Brief at 10. In fact, although 2458 Old Dorsett is Wilson's office address, Lisk had no office at 2458 Old Dorsett. Tr III-V at 510. She did not even have a mail slot at the Corporate Office Center. Tr. I-II at 496. Ms. Lisk worked out of her home address which is different from the address on the letter written by Mr. Kiernan. Tr. III-V at 506, 510.

Appellants are also wrong to attribute information from the Missouri Real Estate Commission as an indication of a real estate agent's "business address." Appellants' Brief at 13. The Missouri Real Estate Commission does not have business office information on any agent, only the address of their broker. Tr. III-V at 529-531. The Missouri Real Estate Commission is not provided with any information about an agent's "office." *Id*. at 532-533. As such, all 3,500 real estate agent licenses held by Gundaker Realtors are registered and maintained at the Corporate Office Center, 2458 Old Dorsett Road. *Id*. at 533.

Gundaker agrees that Mr. Kiernan called Wilson and asked for an address. Tr. I-II at 443. Mr. Kiernan and Wilson knew each other from having lived in the same area some 30 years ago. Tr. I-II at 441-442. During the conversation, and despite having a relationship with Wilson, Mr. Kiernan never once expressed any concern about the property, never told his "old friend" about the supposed "errors and omissions" in construction that he observed, and never even mentioned the two previous letters he had written criticizing the property. *Id*. at 443-444.

Mr. Kiernan testified that he mailed his letter to Lisk at 2458 Old Dorsett Road without including "Gundaker Realtors" or "Gundaker New Homes" in the address. Tr. I-II at 448-449. He heard nothing in return. *Id*. at 450-452. Months earlier, when Mr. Kiernan did not hear back from Ms. Kirk at Janet McAfee Realtors after a few weeks, he re-sent his letter to her via certified mail, return receipt requested. *Id*. at 434. He was concerned that they had not responded and he "wanted to make sure that they took the time to read the letter, not having any idea what had happened with the first letter [sent via regular mail] . . . . and I wanted to make sure that they were reading the letter." *Id* at 434-435. In stark contrast, when Mr. Kiernan heard nothing from Gundaker, he did nothing. He did not send another letter certified, return receipt requested to insure delivery; he did not try to contact Lisk again; he did not even call his "old friend" Larry Wilson back, despite having his phone number. Tr. I-II at 450-452. He did absolutely no follow-up with Gundaker. *Id*. Where he had taken great care to insure that his concerns were read and addressed at Janet McAffee Realtors, he has no idea whether anyone at Gundaker Realtors ever saw or heard of his letters. *Id*.

The testimony regarding what happened at any given time if mail addressed to Lisk was received at Gundaker's Corporate Office Center depended upon the knowledge of the receptionist at the time it arrived. Tr. III-V at 494-500. Lisk has never had a mailbox at the Corporate Office Center. *Id*. at 496. Deborah Hicks, the person responsible for distributing mail at the Corporate Office Center, testified that Lisk left the Corporate Office Center in 1997, and was working out of the Chesterfield Parkway office of Gundaker Realtors in 1998. *Id*. at 496-497. Mr. Kiernan's letter to Ms. Lisk was dated 9/21/98. EXH at 11. Mail for Ms. Lisk was placed in an interoffice envelope for eventual pick by a courier that delivered to all Gundaker Realtors offices. Tr. III-V at 497-499. Ms. Hicks further testified that she found out that Lisk worked with Wilson on the day she was deposed, but was not aware of this connection in 1998. *Id*. at 501-503. In any event, Lisk testified that she <u>never</u> received any letters from Mr. Kiernan. Tr. III-V at 518.

Although Gary Vescovo admitted that he discussed the letter from Mr. Kiernan with Wilson, Gary Vescovo never read the letter, never investigated anything in the letter and believed that it was just some "screwy" person who was not happy with him. Tr. III-V at 479-482. In his words, Gary Vescovo thought the letter was "probably bogus, probably a bunch of baloney." *Id*. at 480. In short, Gary Vescovo dismissed the letter because he did not believe there were any defects with the house. *Id*. at 483. At all times, regardless of with whom Robert or Gary Vescovo talked, they consistently denied any problems with the house. Tr. I-II at 284 (Cathy Lowdermilk -- "They told us that they knew about Gene Kiernan, they know about this letter and that it was a bunch of baloney, basically, and we should disregard it."); Tr. I-II at 484 (Ted Thornhill – " I asked him [Robert Vescovo] about the letter and

asked him if the findings were correct. Bob assured me they were not correct."); Tr. 9/27/00 at 4 (Robert Vescovo – "When Larry and I had lunch one day, I mentioned it to him, and he asked me about it, and I told him that it was bogus, and that was the extent of it."); Tr. 9/27/00 at 5 (Robert Vescovo - "He [Larry Wilson] asked me who this guy was and I said I didn't know, and he said do you know him, and I said no, and he said is there any foundation to it [the letter], and I said no, and he said okay, fine."); Tr. III-V at 460 (Robert Vescovo – "I just had said I had a letter from a crackpot that, you know . . . . I had a letter from a nut case."); *Id*. at 483 (Gary Vescovo – "I wasn't aware of any defects."); *Id*. at 482 (Gary Vescovo – "[I told Mike Lisk] I got another letter from someone I think is screwy."); *Id*. at 486 (Gary Vescovo - "Q. Did you ever even talk [to Larry Wilson] about the water-proofing in the basement? A. No.").

V. Appellants' purchase of the house.

Gundaker is not satisfied with Appellants' account of the purchase. First, appellant's statement that the damp-proofing issue concerned them because it "was a strong indication as to the quality of the construction of the whole house" is completely unsupported. Appellants' Brief at 15. Although there is a citation to the record, neither the page cited nor any of the adjoining pages of the transcript state this proposition.

Second, Appellants assume that Gundaker received copies of Kiernan's letters, when there was no evidence presented to support that assumption, and there was testimony to the contrary. Appellants' Brief at 15; Tr. III-V at 518. Appellants also omit the fact that they never personally called anyone at Gundaker Realtors to inquire about Kiernan's letters after they learned of them. Tr. I-II at 356. Quite on her own, however, Stacy Fryrear, Appellants'

real estate agent, decided to contact Larry Wilson well after the closing to inquire as to his knowledge of the situation. Tr. I-II at 356-357. Wilson denied any knowledge of the alleged defects. *Id.*

Finally, Appellants fail to state that they were represented by their own real estate agent, Ms. Stacy Fryrear, in buyers' agency. Tr. I-II at 276, 354. Ms. Fryrear actually prepared the real estate sales contract for Appellants. Tr. I-II at 345. Appellants never had any conversations with anyone at Gundaker about the house. Tr. I-II at 274, 341. No one from Gundaker made any statements to Appellants about the condition of the house. *Id*. Appellants' only conversation was with Larry Wilson, and that was limited to social greetings. *Id*.

VI. The Lawsuit.

Gundaker is satisfied with Appellants' statement of the claims in the lawsuit. In addition, Gundaker would point out to the Court that Gundaker filed a Motion for Summary Judgment which was denied. LF 113-183. Gundaker also moved for Directed Verdict at the close of Plaintiffs' case (Tr. III-V at 119-123), at the close of Vescovo Respondents' case (Tr. III-V at 490-494) and at the close of all the evidence (Tr. III-V at 576-580).

VII. Alleged Errors and Omission in the Construction of the House.

Gundaker strongly disputes all of Appellants' statements at page 16 of their Brief. Appellants present all alleged damages as recoverable damages, which is a hotly disputed legal conclusion, not a statement of fact. Moreover, Appellants' statement that "the City of Webster Groves refused to issue an occupancy permit" is contrary to the evidence presented and a misstatement of the reported testimony. Appellants' Brief at 16. The City of Webster

Groves, in fact, issued an occupancy permit with the alleged "code violations" existing in December of 1998. Tr. 9/27/00 at 10.

To the extent Appellants cite the testimony of building commissioner Mike Harney to support their contention that the city "refused to issue an occupancy permit," Mr. Harney made no such statement. In response to a question about the effect the violations have on a certificate of occupancy, Mr. Harney testified, "If those are code requirements, the city is obligated to ensure that those mechanisms are in place." Tr. 9/27/00 at 13. Mr. Harney further testified that a person may apply for a variance (Tr. 9/27/00 at 15-16), that a variance has never been requested on the property (Tr. 9/27/00 at 22), and the city could request that repairs be done after an occupancy permit is issued. (Tr. 9/27/00 at 28).

Gundaker agrees that the evidence showed that the exterior foundation was not damp-proofed, and to do so requires the excavation and replacement of soil around the house, as well as the removal and replacement of patios, porches and steps which are next to the foundation. (Tr. 9/27/00 at 86-87).

VIII. Damages Recoverable by Appellants.

Gundaker is not satisfied with any of the statements contained in the corresponding section of Appellants Brief at 17-18. In lieu thereof, Gundaker states that Matt Foreman, Appellants' expert witness, testified that the cost to damp-proof the home is as follows: excavation, damp-proofing foundation and replacement of patios -- $15,000 - $27,800 [The variation in costs depends upon the date of the report prepared by Mr. Foreman. See LF 356-357.] ; re-grade and re-seed lawn (after excavation) – $2,000. The total of these amounts range from $17,000 - $29,800.

Gundaker agrees that Ms. Susan Schiff, Appellants' other witness on damages, testified that she depended upon the values reported by Mr. Forman in determining a cost to repair the home. Tr. III-V at 107. Ms. Schiff stated that she would deduct the cost of repair from the value of the home. *Id*., at 112. Ms. Schiff further agreed that, once the items identified were repaired, the house would return to its original value. *Id*.

Q: If you just limit [the alleged damages] to Mr. Kiernan's letter, then what you would do is take just those things that he identified in the cost to repair, just those things, right?

A: Yes.

Q: Okay. And then that is what you subtract from the purchase price [of $560,000.00], correct?

A: If those were the only items, yes.

Q: Right. If you fix those items, then it goes back up to five hundred sixty thousand dollars [the original value of the home], right?

A: Correct. (Tr. III-V at 112.)

IX. Jury Instructions and Closing Argument.

Gundaker would add the following to Appellants' statements in the corresponding section of their Brief at 19-21: Gundaker submitted proposed instruction A - verdict director- which was refused by the court, and which read as follows:

On plaintiffs claim for Negligent Concealment against defendants Gundaker, Lisk and Wilson, your verdict must be for plaintiffs if you believe:

FIRST, Defendants Gundaker, Lisk and Wilson knew that the outside of the foundation was not waterproofed, and

SECOND, Defendants Gundaker, Lisk and Wilson failed to disclose said condition; and

THIRD, Defendants Gundaker, Lisk and Wilson had a duty to disclose said condition to Plaintiffs; and

FOURTH, plaintiffs did not know, and in the exercise of ordinary care, could not have known said condition; and

FIFTH, plaintiffs lack of knowledge of the condition was material to their purchase of the house; and

SIXTH, Defendants Gundaker, Lisk and Wilson were thereby negligent, and

SEVENTH, as a direct result of defendants' failure to disclose said conditions of the residence, the Plaintiffs were damaged. (LF 330; Tr. III-V at 581).

Gundaker further objected to Appellants' damage instruction and submitted a proposed instruction B - Damages, which the court refused. Tr. III-V at 580, 588 and 590. The proposed instruction read as follows:

If you find in favor of the plaintiffs, then you must award plaintiffs such sum as you believe was the difference between the actual value of the residence on the date it was sold to plaintiffs and what its value would have been on that date had the failure to waterproof been disclosed by defendants.

Appellants intimate that none of the Respondents requested a limiting instruction or made a motion to withdraw any evidence from the jury's consideration. This is not accurate.

All Respondents objected to the submission of the Appellants' damage instruction and submitted a modified version of MAI 4.03 to limit the issues submitted to the jury. Tr. III-V at 588-590. The specific objection to Appellants' instruction was its overbreadth: "It is not each element of damages or everything that is wrong with the house that is submissible in this case, only those damages that were proximately caused by the omitted damp-proofing. So I do not think it provides an accurate instruction to the jury." Tr. III-V at 589.

Also, Gundaker made numerous, repeated objections throughout the trial to the introduction of any "damages" or alleged construction errors outside those contained in Mr. Kiernan's letters. Tr. 9/27/00 at 37-41, 47, 49-50, 53-54, 62, 83.

X. Jury's Verdict.

Gundaker is not satisfied with the Appellant's statements in the corresponding section of their Brief at 21-23. The jury found Gundaker liable for negligence based upon statutory language, not for negligent misrepresentation, a specific cause of action separately pleaded by Appellants as an alternative cause of action. LF 24-64, 308-310, 334-335. Appellants abandoned the remainder of their claims. The jury also assessed compensatory damages in the amount of $140,000.00. LF 335.

Gundaker filed a Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Motion for Remittitur. LF 351-360. Gundaker also filed a legal memorandum in support of those motions. LF 361-379. The Trial Court overruled Gundaker's Motions for JNOV and Remittitur. LF 424. The Trial Court sustained Gundaker's Motion for New Trial "on the grounds set forth in paragraph 2 and that portion of paragraph 10 of Defendants'

Motion claiming error in allowing the jury to consider damage evidence not proximately caused by a failure to damp-proof the foundation as submitted in Instructions Nos. 10,11, and 12." LF 424. The Court of Appeals for the Eastern District upheld the trial court's granting of a new trial. Appendix A1-A19. This Court granted transfer for review on September 24, 2002.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF LIABILITY, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTIONS 10, 11 AND 12 ON A CLAIM FOR NEGLIGENCE *PER SE* BECAUSE:

A. THE LEGISLATURE INTENDED THE MISSOURI REVISED STATUTES §§ 339.710-339.860 TO DEFINE THE RELATIONSHIP BETWEEN A REAL ESTATE BROKER AND ITS CLIENT, REQUIRE DISCLOSURE THEREOF, AND IMPOSE A SCHEME FOR ADDRESSING A FAILURE TO DISCLOSE BUT NOT TO IMPOSE NEW AVENUES OF LIABILITY TO CUSTOMERS OF THE BROKER'S CLIENTS;

Senate Bill No. 664

Bradley v. Ray, 904 S.W.2d 302 (Mo.App. 1995)

Business Men's Assurance Co. of America v. Graham,

891 S.W.2d 438 (Mo. App. 1994)

B. APPELLANTS' ARGUMENT ISOLATES A SMALL SEGMENT OF A SENTENCE WITHIN A SUBSECTION OF THE STATUTE WITHOUT HARMONIZING IT WITH THE STATUTE'S OTHER PROVISIONS AND PLACES AN EXTRAORDINARY EMPHASIS ON A PHRASE WHICH, AS A RESULT, PLACES IT IN CONFLICT WITH OTHER SECTIONS OF THE STATUTE AND

THE COMMON LAW SO AS TO WORK UNREASONABLE, OPPRESSIVE OR ABSURD RESULTS;

State v. Haskins, 950 S.W.2d 613 (Mo.App. 1997)

A G Processing, Inc. v. South St. Joseph Industrial Sewer District,

937 S.W.2d 319 (Mo.App. 1997)

C. EVEN IF §339.730 COULD BE STRETCHED TO SUPPORT A CAUSE OF ACTION FOR NEGLIGENCE *PER SE*, APPELLANTS FAILED TO PRESENT EVIDENCE OF A VIOLATION OF THE LANGUAGE THEY SUBMITTED TO THE JURY, IN THAT THERE WAS NO EVIDENCE THAT GUNDAKER "SHOULD HAVE KNOWN" THAT THE FOUNDATION WAS NOT, IN FACT, DAMP-PROOFED.

Mo. Rev. Stat.§ 339.730

Reeves v. Keesler, 921 S.W.2d 16 (Mo. App. 1996)

Colgan v. Washington Realty Co., 879 S.W.2d 686 (Mo. App. 1994)

II. THE CIRCUIT COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF LIABILITY, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTIONS 10, 11 AND 12 ON A CLAIM FOR NEGLIGENCE *PER SE* BECAUSE NEITHER COURT BASED ITS DETERMINATION ON THE ECONOMIC LOSS DOCTRINE, BUT RATHER ON THE WIDELY ACCEPTED TENET THAT NEGLIGENCE *PER SE* IS

TRADITIONALLY BASED UPON POLICING STATUTES DESIGNED TO PROMOTE PUBLIC SAFETY AND HEALTH, AND NOT LICENSING STATUTES DESIGNED TO REGULATE PARTICULAR OCCUPATIONS.

Gipson v. Slagle, 820 S.W.2d 595 (Mo. App. 1991)

American Mortgage Investment Co. v. Hardin-Stockton Corp.,

671 S.W.2d 283 (Mo. App. 1984)

III. THE CIRCUIT COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF LIABILITY, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT APPELLANTS BASED THEIR CLAIM UPON NEGLIGENCE *PER SE*, NOT NEGLIGENT OMISSION, AND, ASSUMING, *ARGUENDO*, MISSOURI RECOGNIZES A CLAIM FOR NEGLIGENT OMISSION, APPELLANTS' INSTRUCTIONS 10, 11 AND 12 WERE IMPROPER BECAUSE THEY FAILED TO INCLUDE ALL NECESSARY ELEMENTS, INCLUDING KNOWLEDGE OF THE ALLEGED FACT OMITTED.

Dobbins v. Kramer, 780 S.W.2d 717 (Mo. App. 1989)

Vendt v. Duenke, 210 S.W.2d 692 (Mo.App. 1948)

IV. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF DAMAGES, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT THE JURY'S AWARD WAS EXCESSIVE AND INCLUDED DAMAGES NOT RELATED

TO A FAILURE TO DAMP-PROOF, AS SUBMITTED BY APPELLANTS, BECAUSE APPELLANTS ARE NOW USING A METHOD TO JUSTIFY THE JURY AWARD WHICH IS NOT RATIONAL, NOT SUPPORTED BY THE EVIDENCE, AND IS IN OPPOSITION TO ESTABLISHED MISSOURI CASE LAW.

Flora v. Amega Mobile Home Sales, Inc., 958 S.W.2d 322 (Mo.App. 1998)

Barnett v. La Societe Anonyme Turbomeca France,

963 S.W.2d 639 (Mo.App. 1997)

V. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF DAMAGES, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT THE JURY AWARD INCLUDES DAMAGES WHICH ARE NOT RECOVERABLE BECAUSE GUNDAKER TIMELY OBJECTED TO THE ADMISSION OF EVIDENCE OF DAMAGES APPELLANTS NOW SEEK TO RECOVER, GUNDAKER SOUGHT TO CURE THE ADMISSION OF THAT EVIDENCE AND REMOVE IT FROM CONSIDERATION AND THE SUBMISSION AND CONSIDERATION OF THOSE DAMAGES WOULD RESULT IN MANIFEST INJUSTICE.

MFA Oil Co. v. Robertson-Williams Transport, Inc.,

18 S.W.3d. 437 (Mo.App. 2000)

Egenreither v. Carter, 23 S.W.3d 641 (Mo.App. 2000)

ARGUMENT

STANDARD OF REVIEW

After the jury in this case returned its verdicts in favor of Appellants and against Respondents, the trial court granted Gundaker's Motion for New Trial. LF 424. The trial court specified its grounds as follows: "on the grounds set forth in paragraph 2 and that portion of paragraph 10 of [Gundaker's] Motion claiming error in allowing the jury to consider damage evidence not proximately caused by a failure to damp-proof the foundation as submitted in Instruction Nos. 10, 11, and 12." LF 424. Paragraph 2 of Gundaker's Motion alleged error in Appellants' verdict directing instructions. Paragraph 10 of Gundaker's Motion challenged the verdict in light of the evidence and certain evidentiary rulings by the trial court. As such, the trial court's basis for ordering a new trial was two fold: first, upon instructional error in the verdict directors, Instructions Nos. 10, 11, and 12; and, second, upon evidentiary or factual error, relating the difference between the verdict and the damages recoverable under Appellants' submitted cause of action. A20-A29.

In ruling on a motion for new trial the trial court is vested with broad discretion. *Toppins v. Schuermann*, 983 S.W. 2d 582, 585 (Mo. App. 1998). Reviewing courts are more liberal in upholding a trial court's grant of a motion for new trial than its denial and a single ground of error, if prejudicial, will warrant the grant of a new trial. *Simpson v. Kansas City Connecting Railroad, Co*., 312 S.W.2d 113, 120 (Mo. 1958). When the trial court grants a new trial on discretionary grounds appellate courts usually defer to its decision. *Id*. Granting a new trial because an instruction is confusing or misleading is discretionary and the Court of Appeals should defer to the trial court, absent abuse. *Whiting v. United Farm Agency*, 628 S.W.2d. 407 (Mo.App. 1982).

A trial court has the right, in the proper exercise of its discretionary power, to grant a new trial on account of any erroneous ruling, whether an objection has been made or not. "Rule 78.08 makes clear that the court can grant a new trial on a matter not preserved when necessary to avoid manifest injustice or miscarriage of justice." *See MFA Oil Co. v. Robertson-Williams Transport, Inc.*, 18 S.W.3d. 437, 440 (Mo.App. 2000). The trial court's order granting a new trial is presumptively correct and will be disturbed only in the event of a manifest abuse of discretion even if the appellate court believes, based on the cold record, that it might have ruled differently as a trial court. *Id*. An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *McGraw v. Andes*, 978 S.W.2d. 794, 801 (Mo.App. 1998). Furthermore, an abuse of discretion has been defined as a judicial act which is untenable and clearly against reason and which works an injustice. However, if reasonable men could differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id*.

The Appellant bears the burden of proving that the trial court abused its discretion in granting the motion for the stated reasons. *Toppins v. Schuermann*, 983 S.W.2d 582, 586 (Mo.App. 1998) *citing Hyde v. Butsch,* 861 S.W.2d 819, 821 (Mo.App. 1993). However, if a trial court fails to specify the grounds in the order the presumption is that the trial court erroneously granted the motion for new trial and the burden of supporting such action is placed on the respondent. *Rodman v. Schrimpf*, 18 S.W.3d 570, 573 (Mo.App. 2000). "Where the defendant, rather than the plaintiff, is granted a new trial on the ground that the

verdict was against the weight of the evidence, the appellate court is not required to determine whether the evidence was sufficient to support a verdict for the defendant because the defendant is not required to present evidence to weigh." *Torre Specialties, Inc., v Coates*, 832 S.W.2d 914, 918 (Mo.App. 1992) *citing Phillips v. Phillips*, 443 S.W.2d 144, 146 (Mo.banc 1969).

When a new trial has been granted due to instructional error the appellant must show either that the instruction given was not erroneous, or that the instruction created no substantial potential for prejudicial effect. *MFA Oil Company v. Robertson-Williams Transport, Inc*., 18 S.W.3d 437, 439 (Mo.App. 2000) *citing Lashmet v. McQueary*, 954 S.W.2d 546, 549 (Mo.App. 1997). The appellate court examines the record to determine whether the instruction in question was erroneous, and, if found to be so, whether such instruction prejudiced the party challenging the instruction. *Id*. If the instruction is found to be erroneous, the appellate court defers to the discretion of the trial court, absent a showing of an abuse of discretion, because the trial court has the best opportunity to determine the effect of any error. *Egenreither v. Carter*, 23 S.W.3d 641, 645 (Mo.App. 2000).

Appellants, at page 29 of their Brief, state, "Where judgment was entered after a jury's verdict in favor of Appellants, Appellants are entitled to have the evidence and all reasonable inferences deducible therefrom viewed in the light most favorable to the jury's verdict," citing *Bodimer v. Ryan's Family Steakhouses, Inc*. 978 S.W.2d. 4 (Mo.App. 1998). However, *Bodimer* hinged on the weight of the evidence, not an erroneous jury instruction. Also, in *McGraw v. Andes*, the court, regarding the granting of a new trial, stated that "[w]e indulge every reasonable inference in favor of the trial court's ruling." *McGraw v. Andes*,

978 S.W.2d 794 (Mo.App. 1998). Also, in *Lashmet*, the court stated that the "appellate court indulges every reasonable inference favoring the trial court's ruling." *Lashmet v. McQueary*, 954 S.W.2d 546, 549 (Mo.App. 1997).

According to *Wiedower v. ACF Industries, Inc*., "when reviewing the trial court's grant of a new trial, the appellate court must indulge every reasonable inference favoring the trial court's ruling and will not reverse such ruling absent a clear abuse of discretion." *Wiedower v. ACF Industries, Inc*., 763 S.W.2d 333, 336 (Mo.App. 1989) *citing Farley v. Johnny Londoff Chevrolet, Inc*., 673 S.W.2d 800 (Mo.App. 1984).

I. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF LIABILITY, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTIONS 10, 11, AND 12 ON A CLAIM FOR NEGLIGENCE *PER SE* BECAUSE:

A. THE LEGISLATURE INTENDED THE MISSOURI REVISED STATUTES §§ 339.710-339.860 TO DEFINE THE RELATIONSHIP BETWEEN A REAL ESTATE BROKER AND ITS CLIENT, REQUIRE DISCLOSURE THEREOF, AND IMPOSE A SCHEME FOR ADDRESSING A FAILURE TO DISCLOSE BUT NOT TO IMPOSE NEW AVENUES OF LIABILITY TO CUSTOMERS OF THE BROKER'S CLIENTS;

Four requirements must be met to establish a claim for negligence *per se*: 1) a violation of a statute or ordinance; 2) the injured party must be within the class of persons intended to be protected by the statute or ordinance; 3) the injury complained of must be of

the nature that the statute or ordinance was designed to prevent; and 4) the violation of the statute or ordinance must be the proximate cause of the injury. *Business Men's Assur. Co. v. Graham*, 891 S.W.2d 438, 455 (Mo.App.1994). Before the court reaches this analysis, however, it must first examine the statute itself to determine whether the legislature intended to create or allow an action for negligence *per se*. Where the courts have not previously decided whether a private right of action exists under a particular statute, it becomes a matter of first impression for the court. *Bradley v. Ray*, 904 S.W.2d 302, 313 (Mo.App. 1995). Where the legislature does not expressly create or prohibit private civil enforcement of the statute, "a private right of action will be implied only in the narrowest of circumstances." *Id*. (emphasis added).

In 1996, the Missouri Senate enacted Senate Bill No. 664 "to repeal Sections 442.605, 442.610 and 442.615, RSMo. (1994), relating to real estate settlement agents, and to enact in lieu thereof nineteen new sections relating to the same subject, with penalty provisions." A copy of the Senate Bill No. 664 is attached hereto in the Appendix at A32-A45. This Bill was comprised of 16 sections which became §§ 339.710 - 339.860, (hereinafter the "Real Estate Agency Act") thereby completing Chapter 339 relating to Real Estate Agents, Brokers, Appraisers and Escrow Agents. That chapter sets forth the statutory requirements for obtaining and maintaining a real estate sales license and creates the Missouri Real Estate Commission ("MREC") as the regulatory body to oversee and sanction all real estate licensees. *See* § 339.120 RSMo. (1997). The MREC was given rulemaking authority and the ability to discipline licensees under its domain. *See* §§339.120, 339.850 RSMo.; 4 CSR 250-9.010 - 250-9.050.

The Supreme Court of Missouri has held that, "when the legislature has established other means of enforcement, we will not recognize a private civil action unless such appears by clear implication to have been the legislative intent." *Johnson v. Kraft General Foods, Inc*., 885 S.W.2d 334, 336 (Mo.banc 1994), *citing Shqeir v. Equifax, Inc*., 636 S.W.2d 944, 948 (Mo.banc 1982).

> This rule is founded on the notion that legislative intent to create a cause of action exclusively in favor of the Division Director is implicit in the statute. The legislature manifested its intent to create such a cause of action by setting out expressly that particular means of enforcement. It follows that the legislature would have manifested its intent in like manner had it intended to create additional or alternative means of enforcement. The failure to do so gives rise to the implication that the Division Director has the exclusive right to bring suit. The only exception to this rule is recognized where there is a clear indication of legislative intent to establish a private cause of action, despite both the absence of express language to that effect and the presence of "other means of enforcement." *Johnson*, at 336.

Section 339.730 RSMo. is a small part of the overall Chapter relating to Real Estate Agents. The regulatory scheme involves the statutory requirements for licensing and enforcement of those rules and requirements by the Missouri Real Estate Commission (MREC). Section 339.100 RSMo. empowers the MREC to investigate and file formal complaints with the Administrative Hearing Commission for violations of the Act:

> 2. The commission may cause a complaint to be filed with the administrative hearing commission as provided by law when the commission believes there is a

probability that a licensee has performed or attempted to perform any of the following acts:

. . . (2) Making substantial misrepresentations or false promises or suppression, concealment or omission of material facts in the conduct of his business or pursuing a flagrant and continued course of misrepresentation through agents, salespersons, advertising or otherwise in any transaction.

§ 339.100.2(2) RSMo.

In light of the above language, the provision that "a licensee shall disclose to any customer all adverse material facts" contained in § 339.730.3 RSMo. is nothing more than a reiteration of the general duties owed by all licensees in any transaction. That duty is enforced by the MREC through its regulatory powers. That regulatory power is evidenced by the Legislature's specific direction to the MREC in Section 15 of Senate Bill No. 664 (later codified and amended as §339.850): "The commission shall adopt and promulgate rules and regulations to carry out sections 1 to 16 of this act." Appendix at A45.

The purpose of the Real Estate Agency Act is to "create a statutory agency which is intended to take the typical real estate agency relationship out of the realm of common law agency." Sherry A. Mariea and Timothy T. Sigmund, "Real Estate Agents Bid Farewell to Common Law," 54 J.Mo.B. 96 (March-April 1998). It was not intended to be an over arching change of the common law as to every aspect of a real estate transaction, only a codification of the nature and responsibilities of an agency relationship between a real estate professional and his client. It is clear that the legislature recognized previously existing private tort actions by which a citizen might recover for a tort committed by a licensee. The

legislature specifically stated: "Sections 339.710 to 339.860 shall not be construed to limit civil actions for negligence, fraud, misrepresentation or breach of contract." § 339.840 RSMo. Thus, the "clear implication" required by the Supreme Court of Missouri to create a private cause of action for negligence *per se* based upon § 339.730 RSMo. does not exist.

In the case at bar, Appellants hired their own agent, Ms. Stacy Fryrear of Ann Noonan Real Estate Co., under a written buyer's agency agreement. EXH at 4; Tr. I - II at 272. They had no contract or agency relationship with any of the Gundaker Defendants as defined by the Real Estate Agency Act. Tr. I - II at 355. As such, the plaintiffs are not within the class of persons intended to be protected by Chapter 339 RSMo., nor is the injury of the nature that the statute is designed to prevent.[2]

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[2]The Mariea/Sigmund article posited one result of such a reading of the statute: "It is important to note that customers are defined by the statute as consumers who have not entered into a brokerage relationship with a licensee. There is no provision in the new laws prescribing obligations to other consumers to a transaction, such as consumers who have entered into a brokerage relationship with another licensee. . . . Arguably, therefore, a seller's limited agent would also not have to disclose adverse material facts about which the agent knows or should know to a buyer who is represented by a buyer's agent. Under common law, there was no distinction between disclosure obligations based on the other party's representation or lack thereof. Because of the lack of guidance on this issue, the authors of this article believe that the common law theories of agency and misrepresentation may still

apply in such situations. Otherwise, the new law would suggest that an agent could wilfully withhold information about adverse material facts simply because the other party elected to have their own agent." Sherry A. Mariea and Timothy T. Sigmund, "Real Estate Agents Bid Farewell to Common Law" 54 J.Mo.B. 96 (March/April 1998)

Appellants sole argument is that the Gundaker Respondents owed them a duty to disclose all material, adverse facts that they "knew or should have known," and that a failure to disclose any such information constitutes negligence *per se* based upon language contained in a portion of a sentence in a subsection of §339.720 of the Real Estate Agency Act. Appellants' Brief at 30. Unfortunately, they begin their argument based upon an erroneous assumption - that there is no means to enforce this new found tool of law. What they lose sight of is the fact that the legislature did not provide for a <u>private</u> means of enforcement because they provided a mechanism for enforcement by the Missouri Real Estate Commission. Chapter 339 is, in fact, a licensing statute designed, in part, to protect those individuals who hire an agent to represent them in a real estate transaction. The statute does not contemplate or give rise to a private cause of action as an enforcement mechanism.

Appellants argue that the plain language of §339.730.3 "imposes a duty upon real estate licensees." Appellants' Brief at 31. (A full argument on failing to harmonize all sections of the statute together will be discussed in greater detail below.) Appellants first claim that the "plain language" of the statute imposes liability is based upon the fact that §339.810 speaks "in terms of liability." Appellants' Brief at 31. This is inaccurate on two levels. First, §339.810 does not state that "failure to comply with this requirement would subject a licensee to liability for misrepresentation," but rather sets out six separate paragraphs, each stating that the subject of the paragraph "shall <u>not</u> be liable for" the misrepresentation of another, absent specific circumstances. §339.810 RSMo.(emphasis added). Second, the mere mention of potential liability does not support the contention that the legislature intended to create a private cause of action for breach of the statute in

question. *Union Electric Co. v. Brown*, 783 S.W. 2d 409 (Mo.App. 1989) (Negligence *per se* action could not be based upon §319.040 RSMo., which created a presumption of negligence for any violation of the requirements of that chapter).

Appellants' next argument is even more circuitous. Appellants argue that §339.840, which states that the provisions of the Real Estate Agency Act were intended to "supercede the common law of agency with respect to whom fiduciary duties of an agent are owed," creates a sort of hyperlink to an action for negligence *per se.* Appellants reason that, because the legislature intended to impose a duty upon real estate agents that may or may not have existed at common law, the legislature must have intended to create a private cause of action, regardless of the nature of that cause of action. This argument ignores the "plain language" standard that Appellants had been holding so dear. The provisions of the Real Estate Agency Act specifically supercede "the common law of agency." The Real Estate Agency Act does not supercede other common law actions. Those remaining common law actions are specifically exempted from the statute. *See* §339.840 RSMo.

Appellants next argument is that the legislature must have intended a private cause of action under the Real Estate Agency Act because "there is a complete absence of any provision for enforcement." Appellants' Brief at 35. Appellants ignore §339.850, wherein the legislature specifically instructed the Missouri Real Estate Commission to promulgate rules and regulations for the enforcement of the Real Estate Agency Act. See Appendix

page A45.[3] As such, Appellants argument that there is no means for enforcement or that even a means of enforcement would leave Appellants with no remedy, is without merit.

Appellants next argue that, if they were limited to their common law claims, the language they rely on would serve no purpose. This argument completely ignores the remainder of the statute and the purpose of the Act as a whole. Rather than a stand alone directive setting forth specific duties of a realtor regarding disclosure of material information, the language upon which Appellants rely is presented as an exception to an overall elimination of any duty or obligation on the part of a licensee toward a customer. After setting forth eleven distinct and complex duties owed by a realtor to his or her clients (a person with whom the realtor has entered into a brokerage relationship), §339.730 states "a licensee acting as a seller's or landlord's agent owes no duty or obligation to a customer." That absence of duty is followed by an exception that a licensee shall disclose to any customer all adverse material facts. §339.730 RSMo. (emphasis added).

While Appellants would like to ignore the language stating that a licensee owes no duty to a customer, the legislators did not. They were very purposeful in their inclusion of the language regarding the exception. That purpose, however, was not to create a private right of action. The purpose was to prohibit licensees from arguing that the language stating that a licensee owes no duty to a customer abrogates their duty at common law, including fraudulent and negligent misrepresentation. In short, the purpose of the language which

[3]Section 339.850 was later amended to require that the commission adhere to the provisions of Chapter 536 RSMo. However, this requirement did not abrogate the commission's rule making authority nor its ability to enforce the Act.

appellants now seek to wield against Gundaker is nothing more than a recognition of existing common law duties - i.e., the duty to disclose those material facts which are known to the licensee. Just as the legislature did not intend for the lack of duty to be used as a shield, they did not intend for the exception to a lack of duty to be used as a sword, to be hoisted by every Plaintiff who cannot withstand the normal scrutiny of the common law requirements. This is the clear and plain meaning of the statute which Appellants claim would not exist under the Appellate Court's ruling.

Finally, Appellants take great pains to lay out a public policy argument based upon "failing to make full disclosure." However, Appellants entire argument is based upon the unspoken notion that the licensee has some actual knowledge of an adverse material fact. Thus, Appellants argument that "there is no harm in disclosure even if there is some question as to the validity of the information," is hollow. In order to make the "public policy" disclosure that Appellants set forth, the licensee must have knowledge of the information they seek to have disclosed. It is that very knowledge that Appellants strip away by their interpretation of the Real Estate Agency Act and their claim to have some private right of action based thereon.

Appellants rest their "public policy" argument upon a recent case out of the Eastern District of the Missouri Court of Appeals. In *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809(Mo.App. 2002), the Appellate Court refused to enforce a contractual provision wherein a broker attempted to contractually release himself from his own fraud without any consideration. Contrary to Appellants' assertions, however, *Kesselring* did not involve real estate. *Kesselring* involved an asset sale of exclusively commercial personalty. Moreover,

one key distinction between *Kesselring* and the scenario Appellants attempt to create is that *Kesselring* required actual knowledge of the facts which were withheld. *Kesselring* 74 S.W. 3d at 813. The actual knowledge requirement was based upon §551 of the Restatement (Second) of Torts: "One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he represented the nonexistence of the matter that he failed to disclose if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question." *Id.*, at 814, footnote 2 (emphasis added). What Appellants presented to the Trial Court, argued to the jury, argued to the Court of Appeals and now ask this Court to approve is liability based upon failure to disclose information that a real estate agent did not know, but they believe should have known. It is this distinction, which Appellants gloss over so cavalierly, that forms the very basis of Gundaker's argument and provided support for the Court of Appeals affirmation of the Trial Court's grant of a new trial.

B. APPELLANTS' ARGUMENT ISOLATES A SMALL SEGMENT OF A SENTENCE WITHIN A SUBSECTION OF THE STATUTE WITHOUT HARMONIZING IT WITH THE STATUTE'S OTHER PROVISIONS AND PLACES AN EXTRAORDINARY EMPHASIS ON A PHRASE WHICH, AS A RESULT, PLACES IT IN CONFLICT WITH OTHER SECTIONS OF THE STATUTE AND THE COMMON LAW SO AS TO WORK UNREASONABLE, OPPRESSIVE OR ABSURD RESULTS;

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words in their plain and ordinary meaning. *Nall v. Highway and Transportation Employees and Highway Patrol Retirement System*, 943 S.W. 2d 708, 711 (Mo. App. 1997): citing *Jones v. Director of Revenue*, 832 S.W. 2d 516, 517 (Mo. banc 1992). Provisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized. *A G Processing Inc., v South St. Joseph Industrial Sewer District*, 937 S.W.2d 319, 324 (Mo. App. 1997). Sections of statutes should not be read in isolation from context of the whole act. *State v. Haskins*, 950 S.W.2d, 613, 616 (Mo. App. 1997); *Missouri Department of Social Services, Division of Aging v. Brookside Nursing Center*, 50 S.W.3d 273, 276 (Mo. banc 2001).

Section 339.730 sets forth a licensee's duties when acting as a limited agent representing a seller or landlord, including rules regarding the disclosure of confidential information, a licensee's duties to a customer, the ability to show alternative properties, and duties of a subagent.[4] That section is part of a larger act which consisted of sixteen sections

[4]The full text of 339.730 is as follows:

1. A licensee representing a seller or landlord as a seller's agent or a landlord's agent shall be a limited agent with the following duties and obligations: (1) To perform the terms of the written agreement made with the client; (2) To exercise reasonable skill and care for the client; (3) To promote the interests of the client with the utmost good faith, loyalty, and

fidelity, including:

(a) Seeking a price and terms which are acceptable to the client, except that the licensee shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract for sale or to seek additional offers to lease the property while the property is subject to a lease or letter of intent to lease; (b) Presenting all written offers to and from the client in a timely manner regardless of whether the property is subject to a contract for sale or lease or a letter of intent to lease; (c) Disclosing to the client all adverse material facts actually known or that should have been known by the licensee; and (d) Advising the client to obtain expert advice as to material matters about which the licensee knows but the specifics of which are beyond the expertise of the licensee; (4) To account in a timely manner for all money and property received; (5) To comply with all requirements of sections 339.710 to 339.860, subsection 2 of section 339.100, and any rules and regulations promulgated pursuant to those sections; and (6) To comply with any applicable federal, state, and local laws, rules, regulations, and ordinances, including fair housing and civil rights statutes and regulations.2. A licensee acting as a seller's or landlord's agent shall not disclose any confidential information about the client unless disclosure is required by statute, rule or regulation or failure to disclose the information would constitute a misrepresentation or unless disclosure is necessary to defend the affiliated licensee against an action of wrongful conduct in an administrative or judicial proceeding or before a professional committee. No cause of action shall arise against a licensee acting as a seller's or landlord's agent for making any required or permitted disclosure.

relating to real estate agency relationships. Section 339.710 defines twenty terms of the Act, including "client" (one who has entered into a brokerage relationship with a licensee pursuant to the act), "licensee" (a real estate broker or sales person as defined in §339.010), and "customer" (a person in a real estate transaction in which a licensee is involved but who has not entered into a brokerage relationship with a licensee).

Section 339.730 is 563 words long. Appellants choose twenty-two of those words in isolation and state that those twenty-two words create a private right of action, establish a statutory duty and result in a right to pursue an action for negligence *per se* for violation of

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3. A licensee acting as a seller's or landlord's agent owes no duty or obligation to a customer, except that a licensee shall disclose to any customer all adverse material facts actually known or that should have been known by the licensee. A seller's or landlord's agent owes no duty to conduct an independent inspection or discover any adverse material facts for the benefit of the customer and owes no duty to independently verify the accuracy or completeness of any statement made by the client or any independent inspector. 4. A seller's or landlord's agent may show alternative properties not owned by the client to prospective buyers or tenants and may list competing properties for sale or lease without breaching any duty or obligation to the client.5. A seller or landlord may agree in writing with a seller's or landlord's agent that other designated brokers may be retained and compensated as subagents. 6. Any designated broker acting as a subagent on the seller's or landlord's behalf shall be a limited agent with the obligations and responsibilities set forth in subsections 1 to 4 of this section.

those twenty-two words. Oddly enough, the words Appellants chose do not comprise the entire statute. Nor do they comprise an entire subsection, an entire sentence, or even an entire thought contained within the statute. In fact the twenty-two words that Appellants chose are stated as an exception to a rule. But rather than treat these exceptions as exceptions, Appellants choose to extract them from their plain meaning within the Act and hold them up like the "discovery" of New World.

As stated above, sections of a statute should not be read in isolation, but should be read in the context of the whole act. *Haskins*, 950 S.W.2d at 616. By carefully extracting these few words from the statute, Appellants have stripped them of their meaning. Whereas the Real Estate Agency Act was promulgated to establish a statutory framework for defining the relationship between real estate broker and client, Appellants would have the Court ignore that over arching purpose to ascribe some other purpose related to the relationship between a real estate agent and a customer with whom the real estate agent has no relationship, contractual or otherwise. It is hard to believe that this aberration was the legislature's intent. Rather, as stated above, it is much more likely that the legislature intended to simply restate a pre-existing common law exception to an otherwise dutyless relationship.

Appellants claim that they are relying upon the plain meaning of the language that they have extracted from the statute. However, by doing so, they create conflict within the very subsection of the statute on which they rely. It has long been accepted that a real estate agent has a limited duty, defined by common law, to disclose material adverse facts which

are not otherwise discoverable. See *Seidel v. Gordon A. Gundaker Real Estate Company*, 909 S.W.2d 357, 361 (Mo. App. 1995) and *Reeves v. Keesler*, 921 S.W.2d 16, 21 (Mo. App. 1996). What Appellant would have this Court believe, however, is that the legislature intended to impose upon real estate agents a duty to disclose facts that they do not know, but "should have known."

In order for one to disclose something that one does not know, it is only logical to assume that one must have a duty to investigate and/or discover the unknown facts. However, §339.730.3 (the very section upon which Appellants rely) specifically states that "a seller's or landlord's agent owes no duty to conduct an independent inspection of the property for the benefit of the customer and owes no duty to independently verify the accuracy or completeness of any statement made by the client or any independent inspector." §339.730 RSMo. (emphasis added). Thus, Appellants have created a "Catch-22". Under Appellant's interpretation of the statute, real estate agents have a duty to discover information which they do not know while they also have no duty to inspect, question, verify or doubt the accuracy or completeness of the information that they have received.

Where there is genuine uncertainty concerning the application of a statute, it is fitting to consider the statute's history, surrounding circumstances, and to examine the problem in society to which the legislature addressed itself. *Haskins*, 950 S.W.2d at 616. The clear purpose of the statute, as stated on its face and set forth in §339.840, is to supercede the common law of agency and set in its place a statutory framework. The legislature cannot have intended to create a new, essentially "strict liability" cause of action which would

impose upon a real estate agent a duty which is impossible to perform for someone with whom he has no agency relationship. That is not the purpose of this agency statute.

The Court of Appeals should use rules of statutory construction that subserve rather than subvert legislative intent, and should not construe the statute so as to work unreasonable, oppressive or absurd results. *A.G. Processing, Inc.*, 937 S.W.2d at 324. What Appellants propose would produce unreasonable, oppressive and absurd results. For that reason, the Court of Appeals expressed in its opinion: "To hold that this provision was meant to create a cause of action in negligence would allow a plaintiff to collect damages for fraud, misrepresentation or failure to disclose without proving all the traditional elements of those claims. We cannot conclude that the legislature intended, in enacting the statute, to replace these causes of action with a simple negligence action." Appendix at A17 to A18. The Court of Appeals properly affirmed the Trial Court's decision to grant a new trial. That decision should not be disturbed.

C. EVEN IF §339.730 COULD BE STRETCHED TO SUPPORT A CAUSE OF ACTION FOR NEGLIGENCE *PER SE*, APPELLANTS FAILED TO PRESENT EVIDENCE OF A VIOLATION OF THE LANGUAGE THEY SUBMITTED TO THE JURY, IN THAT THERE WAS NO EVIDENCE THAT GUNDAKER "SHOULD HAVE KNOWN" THAT THE FOUNDATION WAS NOT, IN FACT, DAMP-PROOFED.

Having failed to clear the initial hurdle of statutory construction, the Appellants still complain that the Court of Appeals failed to perform the four part analysis to determine if

a statute will create a private cause of action. Although it was unnecessary, such an examination would have been fruitless. Appellants cannot survive the first question: Was there a violation of the statute?

To violate §339.730 (according to Appellant's logic), Gundaker must have failed to disclose "adverse material facts" about the property "actually known or that should have been known" by Gundaker. An "adverse material fact" is defined in the statute. As such it is not given a common, plain language interpretation, but is confined strictly to the language provided by the legislature. *Nall*, 943 S.W.2d at 711. An "adverse material fact" is "a fact related to the physical condition of the property not reasonably ascertainable or known to a party which affects the value of the property." §339.710(1) RSMo.

The adverse material fact submitted to the jury in Appellants' jury instructions 10, 11, and 12 was the failure to damp-proof the foundation. There was no evidence that anyone at Gundaker actually knew that the foundation had not been damp-proofed. The prior realtor who had listed the house while it was being built did not tell Gundaker that there was no damp-proofing. Tr. I-II at 504-505, 522-523. The owners/builders did not tell Gundaker. Tr. III-V at 460-462, 518-519. Even Gene Kiernan did not say anything to Larry Wilson about the condition of the house, despite their friendship. Tr. I-II at 443-444.

The only mention of the foundation was in a letter from Gene Kiernan to the prior listing broker for the property, a copy of which Kiernan states he mailed "to Gundaker." Tr. I-II at 448-449. However, Kiernan addressed the letter to Beth Gundaker-Lisk at an address where Lisk held no office, had no mailbox, and where she did not work. Tr. I-II at 448-449,

496; III-V at 506, 510. In fact, Kiernan's envelope was addressed only to Lisk, not Gundaker Realtors or Gundaker New Homes, which would lead most people to believe that it was a personal letter, not a letter related to a listing. Tr. I-II at 448-449. Even Kiernan admits that he has no idea if anyone at Gundaker ever saw or heard of his letter. Tr. I-II at 450-452. Beth Lisk testified that she never saw the letter. Tr. III-V at 518.

Without actual knowledge of the condition of the foundation, Appellants must assume (as they asked the jury to do) that Gundaker should have known about the condition in some other way. However, there was no evidence that Gundaker had any knowledge of the condition of the foundation other than what the Vescovo Respondents provided. Vescovo Respondents stated repeatedly that the foundation was damp-proofed and Kiernan's allegations were "baloney." More importantly, Kiernan never actually stated that there was an actual problem with the foundation, he merely questioned it. EXH at 6. "I did not see any water proofing on the outside of the foundation....Verification of the condition can be done by removing enough of the backfilled earth to establish the absence or presence of such coatings and, if present, how high up the walls they have been applied." *Id*. This leaves the jury no alternative but to impose upon Gundaker a duty to disbelieve the sellers and conduct some independent investigation of Kiernan's complaints to make an actual determination about the condition of the property. This duty of investigation is contrary to both statute and common law.

Section 339.730 RSMo. (1997) provides, in pertinent part:

3. A licensee acting as a seller's or landlord's agent owes no duty or obligation to a customer, except that a licensee shall disclose to any customer all adverse material facts actually known or that should have been known by the licensee. . . . A seller's or landlord's agent owes no duty to conduct an independent inspection of the property for the benefit of the customer and owes no duty to independently verify the accuracy or completeness of any statement made by the client or any independent inspector. [emphasis added]

Section 339.810 RSMo. (1997) provides, in pertinent part:

3. A licensee who is serving as a limited agent or subagent of a client shall not be liable for misrepresentation of such licensee's client arising out of the brokerage agreement unless the licensee knew or should have known of the misrepresentation.

Finally, §339.840 RSMo. (1997) provides:

Section 339.710 to 339.860 shall supersede the common law of agency with respect to whom the fiduciary duties of an agent are owed in a real estate transaction. Sections 339.710 to 339.860 shall not be construed to limit civil actions for negligence, fraud, misrepresentation or breach of contract.

Thus there was insufficient evidence of a violation of the statute, because the plain language of §339.730 expressly eliminates any duty upon a seller's agent to investigate the statements of a client. One cannot be required to discover information but owe no duty to inspect or verify.

The statutory relief from duty is actually a codification of case law. In *Reeves v. Keesler*, 921 S.W.2d 16 (Mo.App. 1996), a potential purchaser of Keesler's residence entered into a sales contract for such. The potential purchaser alleged that the seller, Mr. Keesler, told him of troubles with the septic system. The concerned potential purchaser informed his real estate agent, Coldwell Banker, of the alleged septic problem. Coldwell Banker discussed the allegations with Keesler, who denied any existence of septic problems. Eventually, the potential purchaser was released from the sales contract.

Keesler later entered into a contract for the sale of the residence with Mr. and Mrs. Reeves, who were also represented by Coldwell Banker. Keesler presented a Statement of Condition that represented that there were no problems with the septic system. A few months after the close of the sale of the residence, the Reeves began to have trouble with the septic system.

The Reeves brought suit against Coldwell Banker alleging that Coldwell Banker fraudulently failed to disclose the allegations of the first potential purchaser. The *Reeves* court held that, "allegations of a prior prospective purchaser, refuted by the owners, were insufficient to provide the Coldwell Banker defendants with knowledge of a defective condition of the property." *Id*. at 20. The court reasoned that to hold otherwise would place a duty on a real estate agency to reveal every allegation, "even those refuted by [the real estate agency's] own client and not otherwise supported, to avoid liability for fraud." *Id*.

Reeves reinforced the rationale of *Colgan v. Washington Realty Co.*, 879 S.W.2d 686 (Mo.App. E.D. 1994). In *Colgan*, the purchasers of a house brought fraudulent and negligent

misrepresentation claims against the sellers and the sellers' real estate agent. The purchasers alleged that failing to disclose leakage problems constituted either fraudulent or negligent misrepresentation. In that case, the sellers were alleged to have known of the leakage problems, but the sellers denied any leakage problems to their agent. The real estate company told the purchasers of the property that they knew of no leakage problems. The court granted Summary Judgment against the buyers as to the real estate company, holding that where the agent never made a specific claim that there were no leakage problems and where there was no evidence that the agent, who merely listed the house for sale, was aware of water leakage, the agent did not fraudulently or negligently misrepresent the alleged problems. *Id*. at 691.

The case at bar fits squarely with the case law described above. Just as in *Reeves* and *Colgan*, Appellants presented no evidence that Gundaker knew of the lack of damp-proofing. The only evidence presented was the musing by Mr. Kiernan as to the presence or absence of coatings. Under the evidence at trial, the jury would have to indirectly infer (despite evidence to the contrary) that Gundaker received and was aware of Kiernan's uncertainties. And just as in *Reeves*, the sellers (the Vescovo Respondents) denied any existence of construction errors or code violations. They told everyone that the damp-proofing was done. As a result, the trial court and the appellate court arrived at the same conclusion that the *Reeves* court reached: Allegations of a neighbor, refuted by the owners, are insufficient to provide Gundaker with knowledge, actual or imputed, of a defective condition of the property. *Reeves*, 921 S.W.2d at 20.

Appellants argued to the trial court that "all Gundaker really had to do was disclose the existence of the letter." But that is not what Appellants asked the jury to find. The letter is not an "adverse material fact" under the Act. Questions about the presence or absence of any building material are not "a fact related to the physical condition of the property." Questions are just that - questions. Questions are not facts. Questions require answers. Facts require some knowledge. Gundaker's client answered Kiernan's questions - the foundation was damp-proofed. The only duty Gundaker owed to Appellants was to disclose known defective conditions of the property. That is the only duty the jury should have been instructed to find. It was not. The trial court corrected the problem by granting a new trial on the matter. The Court of Appeals affirmed that order. This Court should do the same.

II. THE CIRCUIT COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF LIABILITY, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT APPELLANTS FAILED TO ESTABLISH A CLAIM FOR NEGLIGENCE *PER SE* BECAUSE NEITHER COURT BASED ITS DETERMINATION ON THE ECONOMIC LOSS DOCTRINE, BUT RATHER ON THE WIDELY ACCEPTED TENET THAT NEGLIGENCE *PER SE* IS TRADITIONALLY BASED UPON POLICING STATUTES DESIGNED TO PROMOTE PUBLIC SAFETY AND HEALTH, AND NOT LICENSING STATUTES DESIGNED TO REGULATE PARTICULAR OCCUPATIONS.

Appellants complain that the appellate court failed to analyze the Real Estate Agency Act and failed to provide "any explanation . . . as to the purpose of this legislation." Appellants' Brief at 39. Perhaps Appellants failed to read page 17 of the appellate court's opinion. "One of the major purposes of these sections was...." Appendix at A17. "Section 339.840 specifically provides that these provisions supercede 'the common law of agency....'" *Id.* "The statute in this case . . . was meant to change the common law of agency...." *Id.* The appellate court started its analysis of the Act with this examination of legislative purpose. Once it determined that the Act was not intended to support a private cause of action that would eliminate the need to prove the common law elements of fraud, misrepresentation or failure to disclose, they needed go no further. Thus, contrary to Appellants' assertions, the appellate court not only considered "what the legislature might have been trying to accomplish by enacting these statutes," but also what the legislature did not intend.

Appellants also criticize the appellate court for finding *Tedla v. Ellman*, 19 N.E. 2d 987, 990-91 (N.Y. 1939) persuasive in its analysis. Appellants' Brief at 40. Appellants attempt to factually distinguish *Tedla* from the case at bar, but completely ignore the law of the case. *Tedla* was an analysis of the effect of violating a statute on a negligence claim. Whether that claim is brought as an affirmative defense or a direct claim is irrelevant. The burdens are the same. Appellants themselves recognize that "negligence *per se* is nothing more than negligence as a matter of law." Appellants' Brief at 32. *Tedla*'s analysis is sound. In fact, in addition to our own Court of Appeals, that reasoning seems to have impressed the

authors of the Restatement (Second) of Torts (§§286, 288A, 469), the Restatement (3d) of Torts (§§ 3, 8), Am. Jur. 2d Negligence §759 and several law reviews, including Buffalo (47 Buff. L. Rev. 117), Duke (41 Duke L.J. 191, 272) Notre Dame (72 Notre Dame L. Rev. 1415, 1448) and Stanford (48 Stan. L. Rev. 311, 384).

Most intriguing is Appellants' statement that "the appellate court also held that a statute that protects economic interests only cannot be the basis of a negligence *per se* action." Appellants' Brief at 41. In fact, the appellate court made no such holding. "The doctrine of negligence *per se* has traditionally arisen in cases involving personal injury and physical injury to property. Plaintiffs have not cited any Missouri case that has extended the negligence *per se* doctrine to cases which involve damage to economic interest." Appendix at A16. The appellate court's statements are true. Moreover, Appellants still have cited no Missouri case, or any other jurisdiction, that has extended the negligence *per se* doctrine to cases which involve damage to economic interest.

Even Appellants must admit, licensing statutes have not served as the basis of a negligence *per se* action. See *Gipson v. Slagle*, 820 S.W.2d 595 (Mo. App. 1991); *Business Men's Assurance Company of America v. Graham*, 891 S.W.2d 438, 455 (Mo.App. 1994); *American Mortgage Investment Co. v. Hardin-Stockton Corporation*, 671 S.W.2d 283 (Mo.App. 1984). This is principally based upon the fact that the statute contemplates some relationship between the licensee and a small group of people who will seek their services. The existence of a disciplinary scheme also supports the conclusion that it is those who hire the licensees (rather than the general public) that are afforded protection under the statute.

Gipson, at 597; *Business Men's*, at 456; *Hardin-Stockton*, at 294. "The nature of [the statute] indicates that [it] was not designed to provide a cause of action for negligence *per se* but, instead, to insure that the professional persons it regulates display and maintain a certain standard of competence within their profession. . . . BMA did not prove the third requirement of negligence *per se*, which is that the injury complained of must be of the nature that the statute is designed to prevent." *Business Men's*, at 456.

The courts have recognized the imposition of a duty based on statute where the duty does not exist in common law. For example, there is no common law duty to keep a dog on a leash, but violation of a leash ordinance can serve as the basis of a claim for negligence *per se*. *Egenreither v. Carter*, 23 S.W.3d 641 (Mo.App. 2000). Nor will a disinterested tavern employee be liable at common law for a bar fight, absent a liquor statute which provides that no liquor licensee or employee shall allow disorderliness or brawls upon the premises. *See Monteer v. Prospectors Lounge, Inc.*, 821 S.W.2d 898 (Mo.App. 1992). Nor can one be sued for simply driving a particular size truck on the road, absent a specific penal statute prohibiting it whereby the court will allow a violation thereof to predicate a *per se* finding of negligence. *King v. Morgan*, 873 S.W.2d. 272 (Mo.App. 1994).

In fact, a brief overview of legislation which has supported a claim of negligence *per se* is instructive. Chapter 389 (regulating rail roads) *Moore v. St. Louis & S.F. Ry. Co.*, 267 S.W. 945 (Mo. App. 1925); Chapter 307 (vehicle equipment lighting regulation) *Leek v. Dillard*, 304 S.W.2d 60 (Mo. App. 1957); Chapter 304 (traffic regulations) *King v. Morgan*, 873 S.W.2d 272 (Mo. App. 1994); Chapter 293 (mining regulations) *Perry v. Northwestern*

Coal, 175 S.W. 140 (Mo. App. 1915); Chapter 292 (health and safety) *Millsap v. Beggs*, 97 S.W. 956 (Mo. App. 1906). These safety regulations have all supported negligence *per se*.

On the other hand, Chapter 210 (child abuse reporting act) does not support negligence *per se*, due to its regulatory scheme. *Bradley v. Ray*, 904 S.W.2d 302 (Mo. App. 1995). The same is true of Chapter 327 (regulating architects), *Businessmen's Assurance*, 891 S.W.2d at 438 (and surveyors), *Gipson v. Slagle*, 820 S.W.2d 595 (Mo.App. 1991); and Chapter 339 (the subject of this lawsuit - regulating real estate agents/brokers) *American Mortgage Investment Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283 (Mo. App. 1984).

Oddly, Appellants seem to believe that the mere recitation of the obvious truth that, for various reasons, licensing statutes have not supported claims for negligence *per se*, constitutes some holding by the appellate court that licensing statutes cannot support such an action. The plain but simple truth is that, to date, licensing statutes have not supported such a claim. The reasons are obvious. Even where, as in *Bradley*, a plaintiff can establish that they are in the class of persons intended to be protected by the statute, the court is slow to create new causes of action where both a statutory control exists, and there are other avenues of recovery available to the plaintiff. As much as Appellants find some comfort in the fact that most cases are decided on their individual facts and legislative purpose, those minor differences in *Bradley, Gipson, Businessmen's*, and *Hardin-Stockton* do not support the strained interpretation Appellants impose upon the Real Estate Agency Act.

For these reasons, Appellants' Second point must be denied.

III. THE CIRCUIT COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF LIABILITY, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT APPELLANTS BASED THEIR CLAIM UPON NEGLIGENCE *PER SE,* NOT NEGLIGENT OMISSION, AND, ASSUMING, *ARGUENDO,* MISSOURI RECOGNIZES A CLAIM FOR NEGLIGENT OMISSION, APPELLANTS' VERDICT DIRECTOR WAS IMPROPER BECAUSE IT FAILED TO INCLUDE ALL NECESSARY ELEMENTS, INCLUDING KNOWLEDGE OF THE ALLEGED FACT OMITTED.

Neither counsel for Gundaker nor the Court of Appeals has found a single Missouri decision which positively confirms the existence of a cause of action for "negligent omission." Appellants contend that they have found such authority in "Missouri courts, the Restatement (Second) of Torts and a number of other states." Appellants Brief at 46. Appellants then claim that their verdict directors instructions 10, 11 and 12 set for the elements of negligent omission. They are incorrect on all counts.

Appellants rely on the *Kesselring* case to support their positions. Unfortunately, *Kesselring* is not what Appellants state that it is. Appellants make two sweeping statements about *Kesselring* that are rather surprising. First, Appellants posit: "Much like this case, the buyers in *Kesselring* were purchasers of real estate . . ." Appellants' Brief at 46. *Kesselring* had nothing to do with real estate. The Kesselrings entered into an "Asset Purchase Agreement," where they agreed to purchase "the furniture, fixtures, inventory, and other

tangible personal property," plus intangible assets and rights. *Kesselring*, 74 S.W.3d at 811. Appellants compound this error with a footnote, wherein they state that the plaintiffs in Kesselring did not proceed under the Real Estate Agency Act because this was a commercial transaction, and the act applies "only to residential real estate transactions." Appellants' Brief at 46, footnote 5. This would come as a shock to the thousands of commercial real estate brokers, and the MREC, who find no such exemption in Chapter 339. Sections 339.730 and 339.810 apply to "licensees." A "licensee" is "a real estate broker or salesperson as defined in section 339.010." §339.710 RSMo. There is no restriction on the type of transactions a licensee may handle.

Because the Court of Appeals treated Kesselring's claims for both negligent and fraudulent misrepresentation together, 74 S.W.3d at 813, it is difficult to say that *Kesselring* is a ringing endorsement of negligent omission. However, the court does mention non-disclosure in the context of misrepresentation without distinction. The court supports its discussion of failure to disclose with §551(2) of the Restatement (Second) of Torts.

Contrary to Appellants' contention, however, the Restatement section recited by the Kesselring court does not track the provisions of §§339.730 or 339.810 RSMo. While the Missouri statutes speak in terms of disclosing facts which are "known or should have been known," the Restatement is quite clear that it is limited to 1) business transactions where one party fails to disclose 2) a fact he knows, if, and only if, 3) the speaker is under a duty to exercise reasonable care to disclose the matter in question. *Kesselring*, 74 S.W.2d at 814, citing §551(2) of the Restatement (Second) of Torts. The court went on to describe those

instances where a duty exists: 1) under a fiduciary relationship; 2) upon making a partial disclosure; 3) upon learning that a previously true statement is now false; 4) upon learning that the other is about to take an action that the speaker had not contemplated; and 5) if he knows the other is about to enter into the transaction under a mistake as to the facts. *Id*. In each instance, the common requirement is knowledge. That element is woefully missing from Appellants' instructions, where the jury is allowed to find that Gundaker did not know, but should have known.

Appellants cite a rather long list of cases from other jurisdictions which, they contend, have held that negligent misrepresentation by omission is a viable cause of action. Those cases can be broken down into groups: 1) courts that have recognized negligent omission

only where there is actual knowledge of the information coupled with a partial disclosure;[5] 2) those which held there was no negligent omission, only mentioned the concept[6]; 3) those which hinged upon another area of law[7]. Finally, one case that appellants cited actually held that there was no duty to disclose.[8]

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[5] *Arctic Tug & Barge, Inc. v. Raleigh, Schwarz & Powell*, 956 P.2d 1199 (Alaska 1998) (court specifically rejected imposition of a duty to disclose unknown facts that " should have been known"); *Bair v. Pub. Serv. Employees Credit Union*, 709 P.2d 961, 961-62 (Colo. Ct. App. 1985); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996); *Soc'y of the Roman Catholic Church of the Diocese of Lafayette, Inc., v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 742 (5th Cir. 1997); *Ingaharro v. Blanchette*, 440 A.2d 445, 447 (N.H. 1982) (court held that silence alone will not support misrepresentation, only partial disclosure raises a duty of full disclosure); *R.A. Peck, INc., v. Liberty Fed. Sav. Bank*, 766 P.2d 928, 932 (N.M. Ct. App. 1988); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992).

[6] *Paul v. Destito*, 550 S.E. 2d 739, 744-45 (Ga. Ct. App. 2001); *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1207 (D.C. 1999); *Townsends, Inc. v. Beaurpe*, 716 N.E. 2d 160 165 (Mass. Ct. App. 1999); *Skrmetta v. Bayview Yacht Club, Inc.*, 806 So. 2d 1120, 1124 (Miss. 2002); *Abbott v. Herzfeld & Ruben, P.C.*, 609 N.Y.S. 2d 230, 231-32 (N.Y. App. Div. 1994).

[7] *Shambaugh v. Lindsay*, 445 N.E. 2d 124, 125 n.3 (Ind. Ct. App. 1983) (Breach

of warranties); *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996) (breach of specific statutory duty - held negligence, not misrepresentation); *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057, 1061 (R.I. 1999) (legal malpractice); *D'huyvetter v. A.O. Smith Harvestore Prods.*, 475 N.W. 2d 587, 596-97 (Wis. Ct. App. 1991) (products liability).

[8] *Vanderpool v. Grange Ins. Ass'n*, 756 P.2d 111, 112 (Wash. 1988) (court of appeals reversed trial court's judgment on negligent misrepresentation by omission).

Despite Appellants' recognition that actual knowledge is an element of "negligent omission" in every cited case, they still insist that their verdict directors, which permit findings based on no actual knowledge, state the elements of negligent misrepresentation. However, this seems contrary to the direction Missouri courts appear to be headed. The Western District discussed a verdict director which, although submitted to the court on the theory of fraudulent or intentional misrepresentation, "may arguably set out a negligent misrepresentation."[9] *Dobbins v. Kramer*, 780 S.W.2d 717, 719 (Mo.App. 1989). The

[9] The instruction in *Dobbins* served as the basis of the Gundaker Defendants proposed Instruction A and was described by the court as follows:

Your verdict must be for plaintiffs if you believe:

First, the driveway and basement would flood in heavy rains, and

Second, the defendants knew the driveway and basement would flood in heavy rains and failed to disclose the condition to the plaintiffs, and

Third, the defendants had a duty to disclose to the plaintiffs that the driveway and basement would flood in heavy rains, and

Fourth, the plaintiffs did not know, and in the exercise of ordinary case, could not have known that the driveway and basement would flood in heavy rains, and

Fifth, plaintiffs lack of knowledge of the driveway and basement flooding in heavy rains was material to their purchase of the house, and

Sixth, as a direct result of defendants' failure to disclose that the driveway and basement would flood in heavy rains, the plaintiffs were damaged.

Dobbins court included actual knowledge as an element of the claim for negligent misrepresentation based upon a failure to disclose, an element omitted from Appellants' verdict directors. This requirement of actual knowledge is logical when considering the basis of omission as a cause of action. How can someone be legally required to tell someone something he does not know?

The Missouri courts have long accepted that silence, in the face of the duty to speak, can be a misrepresentation. *Mobley v. Copeland*, 828 S.W.2d 717 (Mo.App. 1992). However, before mere silence can amount to an actionable breach of the duty to speak, it must relate to a material matter actually known by the party sought to be held. *Mobley*, 828 S.W.2d at 717 (sellers could not be held liable for failure to disclose that electrical charges ran through swimming pool, although sellers experienced tingling sensation in pool, there was no evidence that sellers knew that sensation was electrical in nature). Moreover, as discussed above, in a negligence context, most jurisdictions require some affirmative, albeit incomplete, statement. That element is absent from the case at bar.

Knowledge of a seller is not imputed to an agent, but must be shown independently. In *Vendt v. Duenke*, 210 S.W.2d 692 (Mo.App.1948), the court held that although the jury would be justified in finding that a seller knew of undisclosed defects, "[t]here was no evidence that defendant [agent] had knowledge of the defect in question, nor was there any evidence from which knowledge could be imputed to him. He, therefore, was not guilty of any breach of duty toward plaintiffs on the evidence presented." *Vendt v. Duenke*, 210 S.W.2d 692, 699 (Mo.App. 1948). In this case, while there is some evidence that the sellers

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Dobbins, at 719.

may have known the foundation lacked damp proofing, there is no evidence presented that shows Gundaker had any knowledge concerning the lack of damp-proofing. Because there was no evidence that Gundaker actually knew that the foundation had not been damp-proofed, submission of the issue to the jury was improper.

Appellants' submitted instructions against Gundaker state no recognized cause of action. For this reason, the trial court set aside the judgment and ordered a new trial on the issues. Even if Appellants had properly submitted a jury instruction with all of the elements required, Appellants' case would have failed as to Gundaker. There was no evidence of actual knowledge of any material defect in the property which Appellants purchased. Gundaker made no "partial disclosure" to create some duty to speak to the Appellants. In fact, Gundaker made no disclosure to Appellants because Gundaker was never privy to any allegations of supposed "defects." Perhaps that is why Appellants chose this particular course of action - they had no legally recognized case against Gundaker, so they tried to create one. The trial court saw through this, as did the Court of Appeals.

For these reasons, Appellants' Third point must be denied.

IV. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF DAMAGES, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT THE JURY'S AWARD WAS EXCESSIVE AND INCLUDED DAMAGES NOT RELATED TO A FAILURE TO DAMP-PROOF, AS SUBMITTED BY APPELLANTS, BECAUSE APPELLANTS ARE NOW USING A METHOD TO JUSTIFY THE JURY

AWARD WHICH IS NOT RATIONAL, NOT SUPPORTED BY THE EVIDENCE, AND IS IN OPPOSITION TO ESTABLISHED MISSOURI CASE LAW.

The damages awarded by the jury were excessive and the verdict was disproportionate to and inconsistent with the proof of the injury submitted to the jury. The jury returned a verdict of $140,000.00 in compensatory damages. The only "wrongful act" submitted to the jury as to any defendant related to damp-proofing, the repair of which was estimated by plaintiffs' expert to cost $15,000.00 - $27,800.00 (the same number used to estimate the diminution in value of the Residence). LF 356-257, TR. 9/37/00 at 86-87. However, the jury was allowed to consider damage evidence, over Gundaker's repeated objections, which was not proximately caused by a failure to damp-proof the property as submitted in Plaintiffs' instructions numbered 10, 11 and 12.

The jury was instructed to consider damage resulting from a specific representation regarding only damp proofing on the exterior of the foundation. However, the jury was presented evidence of and apparently considered damages related to siding, roofing, porches, painting, floor joists, anchor bolts, crawl space access and/or demolition and reconstruction of a beam supporting a wall within the residence. TR. 9/27/00 at 86-90. Thus, where the jury is presented and allowed to consider irrelevant evidence, the verdict is "simply disproportionate to the proof of injury and results from an honest mistake by the jury in its assessment of the evidence." *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo.App. 1997).

As stated above, plaintiffs elected to submit to the jury only one of the four theories pleaded in their Amended Petition against the Gundaker Defendants - negligence *per se*. Moreover, the plaintiffs elected to include only one representation in their verdict director - failure to disclose "that the exterior of the foundation of the [Residence] had not been damp-proofed," (LF 308-310), as opposed to the nine separate representations alleged in their petition. LF 24-64.

It is long standing "black letter law" that damages must be proximately caused by the wrong alleged. *See Miller v. Ford Motor Co.*, 732 S.W.2d 564 (Mo.App. 1987) and *Heberer v. Shell Oil Co.*, 744 S.W.2d 441 (Mo.banc 1988). If the injury is not proximately related to the alleged malfeasance, there can be no recovery. The same is true in cases of misrepresentation. In order for a representation - whether by word or by silence- to be actionable, there must exist a causal connection between the representation and the harm sustained. *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo.banc 1988). "It must appear in an appreciable sense that the damage flowed from the fraud as the proximate and not the remote cause, and the damage must be such as is the natural and probable consequence of the fraud." *Collins v. Adams Dairy Co.*, 661 S.W.2d 603, 605 (Mo.App. 1983). The misstatement must be the "legal cause" of the damages - "the loss reasonably expected to stem from reliance upon the representation." *Id.*

In the present case, evidence of appellants' damages came from their two experts, Matt Foreman and Susan Schiff. However, Foreman's damage calculations included items of damages which were not recoverable against the Gundaker Defendants and were outside

the scope of the pleadings. Tr. 9/27/00 at 37-41, 50-96; LF 356-357. Mr. Foreman was allowed to testify, over the Gundaker Defendants' repeated objections, about "damages" which were neither proximately related to the nine representations alleged in Plaintiffs' Petition nor proximately caused by the sole issue submitted in Plaintiffs' verdict director instructions regarding damp-proofing on the exterior of the foundation. Tr. 9/27/00 at 37-41, 47, 49-50, 53-54, 62, 83; Cf. LF 24-64. Mr. Foreman's changing opinion included repairs and replacements related to siding, roofing, porches, painting, floor joists, anchor bolts, crawl space access and demolition and reconstruction of a beam supporting a wall within the Residence. However, no where in the record was there even a scintilla of evidence about anyone having any information which would lead them to question the condition of the siding, roofing, floor joists, painting, crawl space or support beams. In fact, the record indicates that the appellants had an inspection of the property. EXH. 16-31; Tr. I-II at 275-278. As such, appellants were in a better position than Gundaker to know anything about any defects in the construction of the house.

Susan Schiff based her entire calculation of value upon the testimony of Matt Foreman. Tr. III-V at 107. This method of valuation is not recognized by the appraisal industry or the court. Ms. Schiff was allowed to testify as to an opinion which changed three times during the course of discovery and during the course of the trial itself, even after she stated in deposition that she had no opinion as to the value of the property. Tr. III-V at 104. In any event, she ultimately agreed that the diminution in the value of the property was equal to the cost of repair. Tr. III-V at 112.

Appellants argued at trial that the inclusion of all the various problems Mr. Foreman identified with the property are recoverable because "the plaintiffs would not have bought the house if they had known about the damp-proofing." Tr. I-II at 296; Tr. 9/27/00 at 39-41; Tr. III-V at 599. The same argument has already been rejected by this Court in *Collins*: "It is not enough that plaintiff would have suffered no damages if she had not purchased the franchise, and that she would not have purchased the franchise had she known that Store 47 would not be closed; it must be shown that failure to close Store 47 was the direct and proximate cause of her loss. *Collins, supra*, 661 S.W.2d at 605; *see also, Miller v. Ford Motor Co.*, 732 S.W.2d 564 (Mo.App. 1987) (rental bills, car repair, inconvenience, attorneys fees and costs not recoverable because not causally connected to the representation).

The reason Missouri Courts require a causal connection between damages and a specific representation is because it makes sense! Real estate agents are not insurers of the property. To hold real estate agents liable for conditions which are completely unrelated to any statements they made, including conditions which were neither known nor discoverable at the time of the sale, is simply unjust. Consider the hypothetical situation of a licensee meeting a prospective buyer at an open house in the middle of summer. Assume the licensee innocently states that the seller indicated that a wood burning stove in the basement works. Assume further that the wood burning stove smokes excessively when it is lit seven months after purchase, and during the discovery process of a subsequent lawsuit, termites and roof leaks are discovered. Under appellants view of liability, the buyers need only claim that they

"would not have bought a house with a smoking stove" in order to recover the entire cost of the home, regardless of the cost of repairing the stove. This would expose a licensee to unlimited liability for a multitude of unforeseeable problems based upon an innocent, albeit incorrect, statement about the condition of a wood burning stove. In this case Gundaker made no statement at all. By not challenging the results of a code compliance inspection by the local civic authority based upon the rantings of a "crack-pot," Appellants would hold Gundaker liable for either the entire value of the residence or the cost of repairing every imaginable complaint the buyers might conceive. This cannot be the result intended by the courts.

Appellants argue that there were "other damages" which the Jury could consider, including the testimony of Mike Harney, Webster Groves Building Inspector, and Susan Schiff, a real estate broker. Appellants' Brief at 53-57. Appellants cite Mr. Harney's testimony to support an assumption that the house was not marketable because the City of Webster Groves "refused to issue an occupancy permit." Appellants' Brief at 56. However, Mr. Harney never stated that the City would not issue an occupancy permit, only that the code violations would need to be corrected. Tr. 9/27/00 at 13. In fact, the city issued an occupancy permit on the home after the next door neighbor, Bill Buchanan, told Mr. Harney that the house had not been damp-proofed. Tr. 9/27/00 at 30, 243-245, 247. Mr. Harney further testified that a buyer could apply for a variance from the code to avoid the necessity of repair, or the city could request repair sometime after the permit was issued. Tr. 9/27/00 at 15-16, 22, 28.

In light of Mr. Harney's testimony, a "lack of occupancy permit" cannot be considered as damage. Even if Mr. Harney had stated that obtaining the permit was conditioned upon repair, there was no testimony assessing a dollar value to this process. No one stated that this code compliance requirement diminished the value of the property. Moreover, once the repairs are made, the code problem evaporates and the city can issue an occupancy permit. Therefore the "value" of a code violation is nothing more than the cost of repair.

Appellants' further argue that Susan Schiff assesses a 10% to 20% additional diminution in the value of the house over the cost of repair, "or even greater." Appellants cite a portion of the transcript to support the imposition of a 20% reduction in value, however the record makes no mention of that value. It merely states that the percentage could be "greater." Tr. III-IV at 16-20. As such, the only evidence the jury heard was about a 10% reduction in value. *Id*. However, even Ms. Schiff admitted that the 10% diminution is not applicable in this case. Ms. Schiff admitted that, if the repairs were made, the house would suffer no loss of value. TR. III - V at 112. In short, if appellants made the repairs required, they could sell the house for full value, and their only loss would be the money spent to repair the problems. *Id*.

Q: If you just limit [the alleged damages] to Mr. Kiernan's letter, then what you would do is take just those things that he identified in the cost to repair, just those things, right?

A: Yes.

Q: Okay. And then that is what you subtract from the purchase price, correct?

A: If those were the only items, yes.

Q: Right. If you fix those items, then it goes back up to five hundred sixty thousand dollars [the original value of the home], right?

A: Correct. (Tr. III-V at 112.)

Even if the court were to agree that a 10% discount from the remaining value of the home, it still would not amount to the jury's award. The highest value of the cost of repairs was $27,800.00. Using Appellants' method of calculation, the "discount value" would be $53,220.00 (10% X ($560,000 - 27,800)). The result is only $81,020.00 loss of value. This is far less than the $140,000.00 verdict. The only conclusion can be that the jury considered damages which were not recoverable in this case.

Appellants' submitted their case against Gundaker under a theory of negligence *per se*. LF 308-310. Appellants agree that negligence *per se* is nothing more than negligence as a matter of law. Therefore, the damages in this case should be viewed like any other negligence case. "The measure of damages in a negligence action for damages to real property is the difference in fair market value before and after the defendant's negligent conduct or the cost of repair, whichever is less." *Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322 (Mo. App. 1998). Thus, where the jury was presented with both the measure of damages and the cost of repair, the court must award the lesser of the two.

Appellants may point out that the cost of repairs test is "limited to situations where repairs amount to a small percent of the diminution in value." *Flora*, 958 S.W.2d at 324; *see*

also, *Wasson v. Schubert*, 964 S.W.2d 520, 525 (Mo. App. 1998) (regarding a misrepresentation case against the sellers of a home); and *St. Louis County v. Taylor-Morley, Inc*., 923 S.W.2d 507, 511 (Mo. App. 1996) (regarding the purchase of a new home from a builder).

Under the scenario the Appellants now wish the court to adopt, in trying to justify the jury's award as "reasonable," a "20% discount off the remaining value of the home" should be added to the cost of repair. Appellants' Brief at 56-57. Appellants claim this amount is warranted by the testimony of Susan Schiff. *Id*., at 57. As discussed above, Ms. Schiff never stated any amount other than 10%, and, further, admitted that no discount would be warranted in this case. Tr. III-V at 112. Once Appellants repaired their home, it would return to its original value. *Id*.

A twenty per cent discount on the value of this home, as Appellants calculate it is over $100,000.00! This make the "discount" almost 3 times the cost of repairs. A cost to repair that is one-quarter the diminution in value certainly falls within the "small percentage" test described in *Flora*. Otherwise, under Appellant's scheme, a $100.00 repair would net the Appellants $112,100.00 in damages! That is neither conscionable, nor is it the law.

For the aforementioned reasons, the trial court properly granted Gundaker's Motion for New Trial and Appellant's Fourth Point must be denied.

V. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL TO GUNDAKER ON THE ISSUE OF DAMAGES, AND THE APPELLATE COURT PROPERLY AFFIRMED THE GRANTING OF A NEW TRIAL, IN THAT THE

JURY AWARD INCLUDES DAMAGES WHICH ARE NOT RECOVERABLE BECAUSE GUNDAKER TIMELY OBJECTED TO THE ADMISSION OF EVIDENCE APPELLANTS NOW SEEK TO RECOVER, GUNDAKER SOUGHT TO CURE THE ADMISSION OF THAT EVIDENCE AND REMOVE IT FROM CONSIDERATION AND THE SUBMISSION AND CONSIDERATION OF THOSE DAMAGES WOULD RESULT IN MANIFEST INJUSTICE.

A trial court has the right, in the proper exercise of its discretionary power, to grant a new trial on account of any erroneous ruling, whether an objection has been made or not. Also, "Rule 78.08 makes clear that the court can grant a new trial on a matter not preserved when necessary to avoid manifest injustice or miscarriage of justice." *See MFA Oil Co. v. Robertson-Williams Transport, Inc.*, 18 S.W.3d 437, 440 (Mo.App. 2000). This is particularly true where the error is instructional. The court in *MFA Oil* affirmed the trial court's grant of a new trial, despite Defendant's lack of objection to an instruction. "It is true that the trial court could have regarded MFA's claim of error as not preserved. However, the trial court has discretion to grant a new trial when it finds that error occurred, whether or not there was a timely objection." *Id*. at 440. The *MFA* court concluded that the trial court correctly regarded the instruction as erroneous and prejudicial and would not disturb that ruling. *Id*. If an instruction is found to be erroneous, this court will "defer to the discretion of the trial court, absent a showing of an abuse of this discretion, because the trial court has the best opportunity to determine the effect of any error." *Egenreither v. Carter*, 23 S.W.3d 641, 645 (Mo. App. 2000).

Even if Gundaker were required to preserve the issue by timely objection, appellants' argument would fail because Gundaker repeatedly objected in timely fashion. Contrary to appellants' assertions, Gundaker objected not once, but six times during the course of the trial. Tr. 9/27/00 at 37-41, 47, 49-50, 53-54, 62, 83. The basis of the objections were always the same: the damage evidence was not relevant, not recoverable and beyond the scope of the pleadings in that the only allegation against Gundaker was a failure to disclose a letter. As such, Gundaker sought to limit the evidence to allegations contained within the letter mentioned in the pleadings. Appellants even agreed that the objection would be of a continuing nature to avoid constant interruption. Tr. 9/27/00 at 53, 54, 62, 83. The court did not state its reasons for overruling the objections. However, the trial court was quite clear as to its reason to grant Gundaker's Motion for New Trial - error in allowing the jury to consider evidence not proximately cause by a failure to damp-proof. LF424. Obviously, the trial court reconsidered to propriety of overruling Gundaker's objections.

Also contrary to appellants' assertions, Gundaker timely objected to the damage instruction tendered by appellants and offered an instruction that would have cleared up any confusion on the part of the jury. Tr. III-V at 588-590; LF 325. Gundaker adopted the Vescovo Respondents' specific objection that appellants' damages instruction was overbroad and could confuse or mislead the jury. TR III-V at 589-590. "Granting of a new trial because an instruction is confusing or misleading is discretionary" and the trial court is in the best position to determine the effect of the error. *Whiting v. United Farm Agency, Inc.*, 628 S.W.2d 407, 409 (Mo.App. 1982).

Appellants now argue that a statement in Ms. Boggs' closing argument bound Gundaker to her "concessions" as to additional damages. As stated above, the very basis of Appellants' calculation is erroneous. Notwithstanding, Appellants assert that Gundaker cannot now complain that Vescovos admitted additional damages for which, they believe, Gundaker was jointly and severally liable. There are several flaws in Appellants' argument. First, as stated above, Gundaker had a running objection to the evidence outside the scope of Kiernan's letter, to which Appellants agreed. As such, Appellants foreclosed this very argument with their agreement that any discussion of extraneous damages where subject to Gundaker's objection. Moreover, Appellants conveniently omit a portion of the record from their quoted text, wherein Ms. Boggs specifically exempted Gundaker from these "additional" damages. "...and it should only be against the Vescovos and not Gundaker. They are not even involved." Tr. III-V at 626.

Second, as previously stated, Appellants limited their recovery to damp-proofing. This limitation was their choice. The submission regarding any alleged misrepresentation or negligence was Appellants' choosing.

Most importantly, as also stated above, the court has the power to correct a manifest injustice. Even if Gundaker could be held liable for Vescovo's alleged "concessions," the cost to repair was far less than the jury award. The court was well within its power to set aside an award which exceeds by a factor of 3 the total amount recoverable under the pleadings.

For all these reasons, appellants Fifth point must be denied.

CONCLUSION

Based on the foregoing, the trial court in this case appropriately granted Gundaker's Motion for New Trial. The jury was allowed to consider irrelevant and prejudicial evidence, failed to follow the limitation in the verdict director, and awarded excessive damages which were not recoverable under the theories submitted by Appellants. Also, the trial court erred in submitting Instructions Nos. 10, 11, and 12, which were Appellants' verdict directors because they misstated the law and were prejudicial. Gundaker prays this Court for an Order affirming the trial court's order granting it a new trial, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,
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